

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff/Respondent,	§	
v.	§	Cr. No. C-06-380 (6)
	§	C.A. No. C-08-377
CATARINO GUTIERREZ, JR.,	§	
	§	
Defendant/Movant.	§	

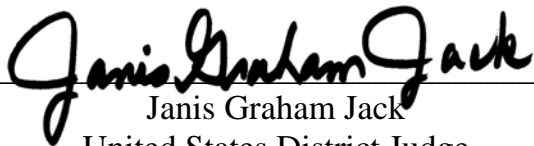
**ORDER DENYING WITHOUT PREJUDICE MOTION TO VACATE,
SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255**

Defendant Catarino Gutierrez, Jr. pleaded guilty pursuant to a written plea agreement with the government (D.E. 264, 265) and was sentenced by this Court on June 16, 2008. (D.E. 290.) Final judgment was entered on June 19, 2008. (D.E. 291.) Gutierrez timely appealed and his appeal remains pending before the Fifth Circuit. See generally docket sheet in United States v. Gutierrez, No. 08-40638 (5th Cir.). Indeed, briefing in the case was completed only on November 5, 2008.

On November 28, 2008, the Clerk of this Court received from Gutierrez a motion pursuant to 28 U.S.C. § 2255, as well as an application to proceed *in forma pauperis*. (D.E. 336, 337.) The Court cannot address a § 2255 from Gutierrez while his direct criminal appeal is pending. As the Fifth Circuit noted in Welsh v. United States: “A motion to vacate under 28 U.S.C. § 2255 will not be entertained during the pendency of a direct appeal, in as much as the disposition of the appeal may render the motion moot.” 404 F.2d 333, 333 (5th Cir. 1968), abrogated on other grounds, United States v. Ortega, 859 F.2d 327, 334 (5th Cir. 1988). Similarly, the outcome of Gutierrez’s appeal may moot some or all of the grounds raised in his motion.

For the foregoing reasons, Gutierrez's motion pursuant to 28 U.S.C. § 2255 (D.E. 336) and his motion to proceed *in forma pauperis* (D.E. 337) are DENIED WITHOUT PREJUDICE.

It is so ORDERED this 2nd day of December, 2008.



Janis Graham Jack
United States District Judge